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CITATIONS

In The

Supreme Court Of The United States

OCTOBER TERM, 1964

No. 232

UNITED STATES OF AMERICA, *Appellant*

v.

BOSTON AND MAINE RAILROAD ET AL, *Appellees*

On Appeal from the United States District Court for the District of Massachusetts

MOTION OF BOSTON AND MAINE RAILROAD TO AFFIRM JUDGMENT BELOW

Appellee Boston and Maine Railroad moves that the Court affirm the Judgment of the District Court on the ground that the question presented on appeal is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Where it is alleged that officials of a carrier by agreement used a corporation, International, to purchase assets of the carrier at a profit first to International and then to the officials, did those officials by virtue of such alleged agree-

ment have a substantial "interest" in International as that word is used in Section 10 of the Clayton Act?

ARGUMENT

Section 10 of the Clayton Act, 15 U.S.C. § 20, proscribes dealings between a carrier and another corporation where officials of the carrier in those dealings are at the same time officials of the corporation dealt with or have any substantial "interest" in that corporation. There is no allegation of joint offices here and no claim that the Railroad's personnel named in the Indictment have any stock or other conventional interest in International.

Directed by the Court to particularize what the substantial "interest" might be which if was claimed the individual defendants had in International Railway Equipment Corporation, the government responded:

> "The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

The Indictment had already identified the persons named in the Particulars as persons with high positions in the Boston and Maine: McGinnis—President and Director; Glacy and Benson—Vice Presidents. Para. 2. An Agreement, if proved, among certain of those officials with such positions in B&M to produce profits for International from dealings by it in B&M assets brought about by the intervention of those officials and pursuant to which they received

substantial money, would surely be enforceable in no court in the land. As is said in the leading case of *Guth* v. *Loft, Inc.*, 23 Del. Ch. 255, 5 A. 2d 503, 510 (1939), "Corporate officers and directors are not permitted to use their positions of trust and confidence to further their private interests." See also *Lazenby* v. *Henderson*, 241 Mass. 177, 180, 135 N.E. 302 (1922); Restatement, *Agency* § 387-98 (1958); cf. *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939). Thus, the "interest" of the individual defendants in International alleged is any extra-legal control over it they may have had by reason of their agreement with it to further an illegal objective. Such an "interest" is wholly unenforceable. Any such agreement would have conferred on the officials involved no *legal rights* in International at all.

On the basis of these particulars, adopting the language of the District Court, the question thus becomes whether the word "interest" in the statute includes "one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International". It is the position of this appellee, following the District Court, that the word "interest" refers here, as in common usage, to a legally enforceable *right;* that the individual defendants enjoyed no *rights* in International.

Where a violation of Section 10 of the Clayton Act is found, the carrier may be penalized by a twenty-five thousand dollar fine, the offending individuals by a five thousand dollar fine and jail sentences. Is it reasonable, assuming proof of the charges, to penalize a Railroad, its stockholders, and ultimately the public, because it has become the victim of an illegal scheme by its officials to divert Railroad assets to their personal benefit? Can it be doubted that an "understanding, agreement, relationship, arrangement and

concert of action" such as is referred to in the Particulars would necessarily be surreptitious, clandestine and held secret from the stockholders of the corporation and non-participating officers and directors? And if the "arrangement" is undisclosed and secret as suggested and therefore not within the Railroad's control or power to forestall, what is to be gained by adding the penalty of criminal sanctions to the carrier's losses accruing from the scheme? If the statute is to be construed to penalize a carrier for allegedly allowing itself to be victimized by the illegal, secret conspiracies of its officials, does such a construction not raise serious constitutional problems?

While there may well be devices to conceal the existence of stock holdings and directorships, there is certainly a difference in kind between legal interests so arising, and the ability to determine the existence of such interests, on the one hand, and, on the other, the secret and illegal type of "interest" alleged in the case at bar. In general, where a legal interest is involved, it will be discoverable and it may therefore be not unreasonable to impose policing functions on the carrier itself. On the other hand, where an illegal agreement to loot a carrier is involved, a requirement of internal policing is first of all unnecessary, since by definition the non-interested stockholders and directors will have the strongest motivation, quite apart from the statute, to uncover the illicit undertaking and bring it to a halt, and, secondly, profitless, because, as a practical matter, the carrier will not be able in such situations to act.

The government's contention that Section 10 of the Clayton Act reaches, as an "interest", the *sub-rosa* power decribed at bar is entirely novel. All the cases dealing with Section 10 speak in conventional terms of prohibiting interlocking directorates. Compare *Minneapolis & St. Louis Ry.* v. *United States*, 361 U.S. 173, 190 (1959) ("purpose . . . to prohibit . . . overreaching by . . . common directors") and

Beegle v. *Thomson*, 138 F. 2d 875, 880 (7th Cir. 1943) ("no liability unless such an interlocking director or agency relationship exists"). Neither the statute nor any case thereunder defines the meaning of the word "ifterest", as there used. The only reference in the legislative history that we can find to its meaning suggests that a stock holding was intended. Compare the minority report of Representative Nelson to an early draft of the legislation dealing only with interlocking directorates, complaining that ownership of stock might also produce interlocking control (H.R. Rep. 627 (on H. R. 15657), 63d Cong. 2d Sess. 8-9, Part 3 (May 6, 1914)), with later revisions (see Sen. Rep. No. 698 to H. R. 15657) and the enacted version. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), on which the government relies, actually looks the other way. The statute there involved, 18 U.S.C. § 434, prohibited self-dealing by a government agent "directly or indirectly interested in the pecuniary profits . . . of any corporation" doing business with the United States. This is definitely *not* the language of Section 10 of the Clayton Act. Compare, also, 49 U.S.C. § 20a(12).[1] If Congress had intended the result the government seeks, this is the type of language it would have used. But, it didn't.

The government would justify its construction on the ground that any financial relationship of a railroad official with a firm leading him to favor the firm to the detriment of the railroad is undesirable. This may be so. There is no indication, however, that the activities and relationships

[1] Here is a statute which specifically prohibits a carrier official from receiving "for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation . . . of any securities issued . . . by such carrier." Securities include any evidence of indebtedness. 49 U.S.C. § 20a(2). Thus, when Congress has wished to reach conduct such as is alleged in the Particulars, it has done so in clear and unmistakeable terms.

alleged, if proved, would be outside the reach of state criminal and civil sanctions. Moreover, Count 2 of the Indictment, based on the same factual situation as Court 1,[2] still stands and the individual defendants will presumably be tried on that Count. There is no occasion, therefore, for this Court to legislate an expansion of the statute for fear that the alleged activities of the individuals would otherwise be countenanced.

No citation of authority is necessary for the proposition that penal statutes are to be strictly construed. Nor is it necessary extensively to document the common meaning of "interest" as a "right in the nature of property". Black's Law Dictionary, "Interest" (3d Ed.); see Webster's New International Dictionary "Interest", 1 (2d Ed.). The word "interest", unless the text otherwise requires, connotes a legal right, a legal interest. In affirming that the word did not embrace a concern arising out of an "illegal and illicit plan", the District Court merely gave effect to the common meaning of the word. The arguments of policy the government now advances in its Jurisdictional Statement should be addressed to the Congress. As the statute now stands, any contention that the "understanding" referred to in the Particulars created an "interest" of the individual defendants in International is unsubstantial and without merit.

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[2] That Counts 1 and 2 reflect different theories of criminal liability arising from the same set of facts is plain from a reading of the two counts, together with all the Particulars. The Government's Jurisdictional Statement, in footnote 5 (page 14) to the words "substantial monies", found in the Particulars to Count 1, says "The actual operation of this scheme, so far as it involved the sale of the ten cars involved in this case, is set forth in Count II of the Indictment."

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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